

California Regional Water Quality Control Board
Santa Ana Region
November 18, 2005

ITEM: 14

SUBJECT: Non-Point Source (NPS) Program Plan and the NPS
Implementation and Enforcement Policy

DISCUSSION:

Non-point source (NPS) pollution is California's most pervasive and intractable water quality problem. Over 80% of the State's waterbodies listed pursuant to Clean Water Act Section 303(d) are impaired due to NPS waste discharges. This holds true in the Santa Ana Region – NPS pollutant discharges cause or contribute to the impairment of the 303(d) listed waters within the Region.

In 1988, the SWRCB adopted the state's first "NPS Management Plan," outlining strategies and inter-agency partnerships for NPS management within California. This plan was subsequently revised as the 2000 "Plan for California's NPS Pollution Control Program." These revisions brought the plan into compliance with federal NPS and coastal zone program requirements. The 1988 and 2000 NPS plans relied on a three-tiered approach to NPS pollution control: 1) Voluntary actions by NPS dischargers to implement NPS management measures; 2) Regulatory-based encouragement to implementation of NPS management measures; and, 3) Issuance of waste discharge requirements by regional boards to require compliance with effluent limits, coupled with other regulatory and enforcement actions.

In adopting the 2000 Plan, the State and Regional Boards committed to the implementation of 61 management measures to control NPS pollution by 2013. The plan broadly characterizes NPS discharges as falling within six categories of land use: 1) Agriculture; 2) Forestry; 3) Urban Areas; 4) Marinas and Recreational Boating; 5) Hydromodification; and 6) Wetlands, Riparian Areas and Vegetated Treatment Systems.

The adoption of the 2000 Plan satisfied one requirement of Water Code Section 13369, which was added to the Code in the 1999 legislative session. The new Section 13369 required the preparation of a detailed program for implementing the state's nonpoint source management program. Section 13369 also required the State Board to develop guidance regarding the process by which the State Board and Regional Boards will enforce the nonpoint source management plan.

The 2000 Plan received conditional approval from USEPA and the National Oceanic and Atmospheric Administration. However, federal approval required that the State provide assurances that it has sufficient authority to implement the plan. This requirement, as well as the legislative direction expressed in Section

13369, led the SWRCB to develop *The Policy for the Implementation and Enforcement of the Nonpoint Source Pollution Control Program, 2003* (I&E Policy) (adopted in 2004), describing how existing regulatory and enforcement authorities established in the California Water Code are to be used by the RWQCBs and the SWRCB to implement the NPS Plan. Notwithstanding that (CWC) Section 13369 recognizes the three-tier approach as a NPS program requirement, the I&E Policy abandoned the three-tier approach since it is not supported by Water Code enforcement and regulatory authorities. This policy departure from the three-tier implementation approach was also driven by the recognition that the use of regulatory authority is necessary to assure that NPS Plan implementation is achieved by 2013.

The policy provides guidance and direction to RWQCBs to use Water Code authority to create a set of uniform and consistently applied mechanisms to regulate NPS discharges. The mechanisms identified in the I&E Policy include: (1) waivers of waste discharge requirements (waivers); (2), basin plan prohibitions; or, (3) waste discharge requirements (WDRs). The I&E Policy relies on the SWRCB's 2002 Water Quality Enforcement Policy to provide guidance for appropriate responses and options to enforce NPS regulatory actions.

Waivers are often the regulatory NPS control measure most acceptable to dischargers. CWC Section 13269 specifies that all waivers:

- Must be consistent with state and/or regional water quality control plans, and must also be in the public's interest;
- Be of a duration no longer than 5 years;
- Are conditional;
- Must include a condition requiring monitoring (subject to waiver)
- May include a condition requiring payment of a fee
- May be terminated at any time and they may not exceed five years without being reviewed.

The I&E Policy emphasizes that any waivers issued are to be enforced.

The I&E Policy calls for regional boards' NPS pollution control regulatory actions to require dischargers to develop NPS pollution control programs for the approval of the appropriate board, and to implement the approved NPS pollution control programs. Each discharger-developed program must include four key policy elements: 1) Explicit recognition of the water quality objectives the programs are addressing; 2) Identification of the management practices that will be implemented and how implementation of the practices will be verified; 3) Establishment of an implementation time schedule with verifiable milestones; and 4) Implementation of a monitoring and reporting program that will provide sufficient data to show if the program is being timely and effectively implemented. The monitoring and reporting program will also be used to determine if additional

management measures are needed to achieve the objectives of the approved NPS pollution control program.

A fifth key element in the I&E Policy gives guidance to Regional Boards to consider the possibility that in some cases of NPS implementation, enforcement action may be necessary to compel compliance. Accordingly, waivers or WDRs that facilitate enforcement action should be developed. This can be done by including discussions of enforcement consequences, identifying enforcement triggers, etc., in waivers and WDRs. For example, a waiver or WDR might include provisions reciting conditions under which the regional board may impose administrative civil liability, establishing "grace periods" for reporting, etc.

In the Santa Ana Region, NPS Plan implementation is increasingly being driven by the need to implement Total Maximum Daily Loads (TMDLs). Developing and implementing TMDLs has been established as the highest water quality priority of the State. Because of this, Board staff is focusing its efforts to apply the NPS I&E Policy to circumstances where control of NPS pollutants is necessary to implement adopted TMDLs. To start this effort, Board staff established three subcommittees to study land use categories within the Region and develop an understanding and knowledge base of the NPS pollutants that are associated with them. The three subcommittees are investigating: a) Irrigated and dry land agriculture; b) Open space and open space natural channels; and, c) Forestry, ski resorts, and national forests.

The role of the subcommittees is to formulate recommendations for how to apply the NPS Plan and I&E Policy to the three land use categories listed above. Tentative recommendations will be vetted by the all subcommittee members and refined through an iterative process. Recommendations will be based on an analysis of which I&E Policy guidance option (WDR, conditional waiver, prohibition) is best to address the NPS issue of concern. This analysis will take into account the approaches employed by other regional boards to address comparable NPS problems, the apparent level of success of those approaches, and whether watershed-specific circumstances warrant a different strategy.

NPS issue-specific information gathered by each subcommittee will be evaluated and staff recommendations for further consideration formulated, based on the criteria shown above. An appropriate regulatory action will be proposed and considered with a full public participation process.

Board staff's NPS Plan implementation process will engage external stakeholders, with scoping meetings and discussions of regulatory options. The most likely options will be either waste discharge requirements or waivers. (Because prohibitions require Basin Plan amendments, they will likely not be a practical regulatory tool for addressing NPS issues in the short term.) A scheduled and publicly noticed workshop at a Regional Board meeting and comment period will follow. Comments will be considered, and, if appropriate,

incorporated in to the final draft WDR or waiver that staff will prepare. Staff will respond to all comments. CEQA compliance is a requisite step in considering either WDRs or conditional waivers. A public hearing will be scheduled for the Regional Board to consider adoption of the proposed waiver or WDR.

Dischargers of the NPS pollutant(s) addressed by the WDR or waiver will then have an opportunity to enroll in the waiver or WDR. Staff effort will likely be needed to assure that all appropriate NPS discharges are enrolled. Enrollees will be required to participate in the development and implementation of NPS pollution control programs, either individually or collectively.

The I&E Policy provides that NPS discharges with common issues may collectively develop a NPS pollution control program, implement the plan, conduct required monitoring, and be represented in this process by a third party. Third parties are restricted to entities that are not dischargers under RWQCB or SWRCB jurisdiction. The expectation of the I&E Policy is that this collaborative effort will result in more comprehensive and effective NPS pollution controls than would be possible through individual efforts.

It is likely that the first application of the NPS I&E Policy in the Region will target NPS discharges from irrigated and dry land agriculture. Agricultural runoff typically contains relatively high levels of nutrients and pesticides; suspended solids, a result of soil erosion, are often a concern as well. To date, the Regional Board has adopted two nutrient TMDLs (Newport Bay and San Jacinto/Lake Elsinore Watershed), one pesticide TMDL (Newport Bay), and one sediment TMDL (Newport Bay). These TMDLs have identified agricultural runoff as a significant source of pollutants loads that needs to be controlled to meet the specified load requirement. Accordingly, Board staff is proceeding to develop specific recommendations for the appropriate strategy to address specific NPS pollutants in discharges of agricultural runoff in this Region.

Three regional boards (Central Coast, Central Valley and San Diego) have selected and are implementing conditional waivers as the most practical option for regulating pollutants in NPS discharges from irrigated agriculture operations. The Region 3 (Central Coast) Board adopted a conditional waiver for irrigated agriculture in July 2004. The Region 5 (Central Valley) Board adopted a conditional waiver for irrigated agriculture in December 2002, which was replaced in July 2003 with a revised order that contained additional conditions. The Region 9 (San Diego) Board adopted its irrigated agriculture waiver policy in 2002. In light of the experiences of other Regional Boards, it appears that the conditional waiver is the most appropriate vehicle for initiating regulation of NPS pollutants in discharges from agricultural. Santa Ana Regional Board staff expects to bring the Regional Board a formal recommendation for action on its proposed irrigated agriculture waiver in the first quarter of 2006.